



Volume 102

Issue 5 *Issue 5, A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals*

Article 11

June 2002

Property Law

Robin Jean Davis

West Virginia Supreme Court of Appeals

Louis J. Palmer Jr.

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Robin J. Davis & Louis J. Palmer Jr., *Property Law*, 102 W. Va. L. Rev. (2002).

Available at: <https://researchrepository.wvu.edu/wvlr/vol102/iss5/11>

This A Tribute to Thomas E. McHugh: An Encyclopedia of Legal Principles From His Opinions as a Justice of the West Virginia Supreme Court of Appeals is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

not against the estate itself.⁶²¹

Justice McHugh held in *Sowa v. Huffman*⁶²² that “[t]he duties of a guardian ad litem, who is appointed pursuant to *W.Va. Code*, 27-11-1(b) [1990] to represent an alleged incompetent in a competency proceeding, end when the Committee is appointed and the appeal period has expired.”⁶²³

VII. PROPERTY LAW

A. Eminent Domain

Use of the prior purchase price of property in an eminent domain proceeding was addressed by Justice McHugh in *West Virginia Department of Highways v. Mountain Inc.*⁶²⁴ In that opinion Justice McHugh held:

In an eminent domain proceeding to take private property for public use the purchase price of the property approximately four and a half years prior to the filing of such proceeding is not admissible when there has been a showing that a substantial change in the physical characteristics of the property has occurred since the sale took place and the original purchase price is not probative of the fair market value of the property at the time of the taking.⁶²⁵

In the case of *West Virginia Department of Highways v. Fisher*,⁶²⁶ Justice McHugh addressed the issue of jury bias or prejudice in an eminent domain proceeding. The court held that

[i]n an eminent domain action, although all prospective jurors stated that they could return a verdict free from bias or prejudice, where the record indicates that [thirteen] prospective jurors were acquainted with the landowners and/or their appraisal witnesses, which witnesses testified at trial, and, of the petit jury selected from those prospective jurors, six jurors were acquainted with the landowners and/or such appraisal witnesses, a likelihood of bias or prejudice on the part of the jury existed sufficient to require that

⁶²¹ *Id.* at Syl. Pt. 4.

⁶²² 443 S.E.2d 262 (W. Va. 1994).

⁶²³ *Id.* at Syl. Pt. 2.

⁶²⁴ 279 S.E.2d 192 (W. Va. 1981).

⁶²⁵ *Id.* at Syl.

⁶²⁶ 289 S.E.2d 213 (W. Va. 1982).

the verdict of the jury be set aside and a new trial awarded.⁶²⁷

The case of *West Virginia Department of Highways v. Roda*⁶²⁸ involved determining the value of coal on property taken by eminent domain. Justice McHugh held in the opinion that

[i]n eminent domain proceedings, the date of take for the purpose of determining the fair market value of property for the fixing of compensation to be made to the condemnee is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings pursuant to *W.Va. Code*, 54-2-14a, as amended.⁶²⁹

Justice McHugh also stated that

[w]hen the contractor for the Department of Highways took the landowners' property prior to the institution of lawful condemnation proceedings, the trial judge did not err in refusing to allow the introduction of evidence as to the value of such property on a date prior to the institution of such proceedings.⁶³⁰

Finally, Justice McHugh stated in *Roda* that

[w]hen a condemnor had prior knowledge that its contractor was selling a condemnee's coal which had been severed from the land before the institution of lawful condemnation proceedings, the fair market value of the condemnee's coal, removed before the lawful date of take, is the price for which the coal could be sold, ready for loading, by a person desirous of selling to a person wishing to buy, both freely exercising prudence and intelligent judgment as to its value, without consideration of the mining, production, excavation and marketing costs.⁶³¹

B. *Easement*

In *Sticklen v. Kittle*,⁶³² Justice McHugh held that "[a]n avigation easement in the airspace used by aircraft over lands adjacent to an airport cannot be acquired

⁶²⁷ *Id.* at Syl. Pt. 3.

⁶²⁸ 352 S.E.2d 134 (W. Va. 1986).

⁶²⁹ *Id.* at Syl. Pt. 1.

⁶³⁰ *Id.* at Syl. Pt. 2.

⁶³¹ *Id.* at Syl. Pt. 3.

⁶³² 287 S.E.2d 148 (W. Va. 1981).

by prescription.”⁶³³

Justice McHugh was called upon to construe language in an indenture granting a right-of-way easement in the case of *Kell v. Appalachian Power Co.*⁶³⁴ Justice McHugh held in the opinion that

[l]anguage in an indenture which gives a power company the right to cut and remove trees, overhanging branches or other obstructions that endanger the safety, or interfere with the use, of the power company’s lines on the right-of-way granted by the indenture does not authorize the power company to apply toxic herbicides to that right-of-way by aerial broadcast spraying.⁶³⁵

C. Trustee Sale

Justice McHugh held in *Dennison v. Jack*⁶³⁶ that “[t]he provisions of *W.Va. Code*, ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the trust deed, do not violate the public policy of this State.”⁶³⁷ In *Dennison*, Justice McHugh also stated:

Where a grantor executes a trust deed which confers upon the trustee a power of sale, and upon default of the grantor, the trustee, pursuant to the terms of the trust deed and *W.Va. Code*, ch. 38, art. 1, sells the property granted by the trust deed at public sale, such a sale does not involve significant action by the State of West Virginia; therefore, due process imposed notice and hearing to the grantor of the trust deed prior to the sale are not required by the Fourteenth Amendment to the Constitution of the United States or *W.Va. Const.*, art. III, § 10.⁶³⁸

In *Villers v. Wilson*,⁶³⁹ Justice McHugh held:

The sale of property by a trustee under a trust deed will not be enjoined where the sole ground relied upon for the issuance of the injunction is that the grantor of the trust deed has an unliquidated claim against the creditor whose debt is secured by that trust deed

⁶³³ *Id.* at Syl. Pt. 1.

⁶³⁴ 289 S.E.2d 450 (W. Va. 1982).

⁶³⁵ *Id.* at Syl.

⁶³⁶ 304 S.E.2d 300 (W. Va. 1983).

⁶³⁷ *Id.* at Syl. Pt. 2.

⁶³⁸ *Id.* at Syl. Pt. 1.

⁶³⁹ 304 S.E.2d 16 (W. Va. 1983).

for damages arising out of a transaction unrelated to the trust deed agreement.⁶⁴⁰

D. *Tenants in Common*

Justice McHugh held in *Keller v. Hartman*⁶⁴¹ that

[w]here a tract of land is owned by tenants in common and one tenant grants an easement to a third party, which by the express terms of the grant, purportedly conveys only the grantor's undivided interest, such grant is effective to create an easement on the other tenants' interest, if the other tenant(s) consent to or subsequently ratify the conveyance.⁶⁴²

E. *Restrictive Covenant*

The case of *Allemon v. Frenz*⁶⁴³ called upon Justice McHugh to examine issues involving a restrictive covenant in a property deed. Justice McHugh stated that "[t]he fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish."⁶⁴⁴

Justice McHugh noted next that "[a] valid restrictive covenant may be enforced by one other than a party to the restrictive covenant provided that the parties to the deed in which the restrictive covenant originated intended that the restriction should benefit the land of the person claiming enforcement."⁶⁴⁵ Justice McHugh then concluded:

A restrictive covenant which provides "that no alcoholic beverages shall be sold on said premises, and this covenant shall run with the land" is valid. Where the grantor included the covenant in all subsequent deeds conveying a particular parcel of property with the intention to preserve and protect the quality of the neighborhood, a trial court may grant injunctive relief against a grantee who took the property with full notice of the restrictive covenant, provided that changes in the neighborhood's character are not so radical as to destroy the essential objects and purposes

⁶⁴⁰ *Id.* at Syl.

⁶⁴¹ 333 S.E.2d 89 (W. Va. 1985).

⁶⁴² *Id.* at Syl. Pt. 4.

⁶⁴³ 363 S.E.2d 487 (W. Va. 1987).

⁶⁴⁴ *Id.* at Syl. Pt. 2.

⁶⁴⁵ *Id.* at Syl. Pt. 1.

of the neighborhood's original plan of development.⁶⁴⁶

F. Cemetery Plots

Justice McHugh addressed the legal sanctity of burial plots in *Concerned Loved Ones & Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence*.⁶⁴⁷ The initial issue to be resolved was whether or not statutory restrictions imposed on trustees of burial grounds and incorporated cemetery associations, with respect to the sale of burial land, applied to others. In this opinion Justice McHugh held that "[t]he provisions of W.Va. Code, 35-5-2 [1967] apply only to the types of entities set forth in W.Va. Code, 35-5-1 [1931]."⁶⁴⁸ Justice McHugh then held that "[w]hen land has been dedicated to cemetery purposes, the next of kin of those buried in the cemetery, as well as those who own land for burial in the cemetery, have a cause of action to prevent, or recover damages resulting from, the unlawful desecration of such cemetery."⁶⁴⁹

G. Surface Mining

Justice McHugh was called upon to harmonize state and federal law involving replacement of water polluted by surfacing mining in the case of *Russell v. Island Creek Coal Co.*⁶⁵⁰ Justice McHugh held:

W.Va. Code, 22A-3-24(b), as amended, part of the West Virginia Surface Coal Mining and Reclamation Act, which requires a coal operator to replace the water supply of an owner of an interest in real property whose water supply has been affected by contamination, diminution or interruption proximately caused by the surface-mining operation, but which statute further provides that the replacement of the water supply may be waived by the owner, is not inconsistent with the parallel federal provision contained in 30 U.S.C. § 1307(b), part of the Surface Mining Control and Reclamation Act.⁶⁵¹

In *Phillips v. Fox*,⁶⁵² Justice McHugh set out the circumstances in which an implied right to surface mine may occur. The court held:

⁶⁴⁶ *Id.* at Syl. Pt. 4.

⁶⁴⁷ 383 S.E.2d 831 (W. Va. 1989).

⁶⁴⁸ *Id.* at Syl. Pt. 1.

⁶⁴⁹ *Id.* at Syl. Pt. 2.

⁶⁵⁰ 389 S.E.2d 194 (W. Va. 1989).

⁶⁵¹ *Id.* at Syl. Pt. 3.

⁶⁵² 458 S.E.2d 327 (W. Va. 1995).

The grant of a right to surface mine may be express or implied. The right to surface mine will only be implied if it is demonstrated that, at the time the deed was executed, surface mining was a known and accepted common practice in the locality where the land is located; that it is reasonably necessary for the extraction of the mineral; and that it may be exercised without any substantial burden to the surface owner.⁶⁵³

In *West Virginia Division of Environmental Protection v. Kingwood Coal Co.*,⁶⁵⁴ Justice McHugh wrote:

Under 38 C.S.R. 2-2.84(b)(6) (1996), promulgated pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code, 22-3-1 et seq., owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface mining operation is presumed to constitute ownership or control. In order to rebut this presumption of ownership and control, the person subject to the presumption must demonstrate, by a preponderance of the evidence, that it does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface mining operation is conducted. Whether a person has successfully rebutted a (b)(6) presumption is a factual determination to be resolved on a case-by-case basis.⁶⁵⁵

H. Zoning

Justice McHugh addressed issues involving nonconforming use of property in *H.R.D.E., Inc. v. Zoning Officer of City of Romney*.⁶⁵⁶ Justice McHugh held that

although the right to a nonconforming use when there is something less than actual use is generally determined on a case-by-case basis, the following factors are to be weighed when determining whether or not a landowner has acquired a vested right to a nonconforming use: (1) whether the landowner has made substantial expenditures on the project; (2) whether the landowner acted in good faith; (3) whether the landowner had notice of the proposed zoning ordinance before starting the project at issue; and

⁶⁵³ *Id.* at Syl.

⁶⁵⁴ 490 S.E.2d 823 (W. Va. 1997).

⁶⁵⁵ *Id.* at Syl. Pt. 4.

⁶⁵⁶ 430 S.E.2d 341 (W. Va. 1993).

(4) whether the expenditures could apply to other uses of the land. Mere contemplated use or preparation or preliminary negotiations with contractors or architects will not vest the right to a nonconforming use.⁶⁵⁷

Justice McHugh concluded that “[a] landowner has a vested right to complete a project as a nonconforming use when the landowner acted in good faith while expending approximately \$95,000 in preparing for the construction of a specially designed building for the elderly and physically handicapped before the municipality enacted a zoning ordinance.”⁶⁵⁸

I. Real Estate Broker

The liability of a real estate broker for uninhabitable conditions of property was the subject in *Teter v. Old Colony Co.*⁶⁵⁹ Justice McHugh wrote:

A vendor’s real estate broker may be liable to a purchaser if the broker makes material misrepresentations with regard to the fitness or habitability of residential property or fails to disclose defects or conditions in the property that substantially affect its value or habitability, of which the broker is aware or reasonably should be aware, but the purchaser is unaware and would not discover by a reasonably diligent inspection. It also must be shown that the misrepresentation or concealment was a substantial factor in inducing the purchaser to buy the property.⁶⁶⁰

J. Landlord and Tenant

The issue of a landlord’s liability to a tenant for criminal conduct by a third party was addressed in *Miller v. Whitworth*.⁶⁶¹ Justice McHugh ruled that

[u]nder the common law of torts, a landlord does not have a duty to protect a tenant from the criminal activity of a third party. However, there are circumstances which may give rise to such a duty, and these circumstances will be determined by this Court on a case-by-case basis. A landlord’s general knowledge of prior unrelated incidents of criminal activity occurring in the area is not alone sufficient to impose a duty on the landlord. However, a duty will be imposed if a landlord’s affirmative actions or omissions

⁶⁵⁷ *Id.* at Syl. Pt. 1.

⁶⁵⁸ *Id.* at Syl. Pt. 2.

⁶⁵⁹ 441 S.E.2d 728 (W. Va. 1994).

⁶⁶⁰ *Id.* at Syl. Pt. 1.

⁶⁶¹ 455 S.E.2d 821 (W. Va. 1995).

have unreasonably created or increased the risk of injury to the tenant from the criminal activity of a third party.⁶⁶²

VIII. JUVENILE DELINQUENCY LAW

A. *Restitution*

Justice McHugh held in *State v. M.D.J.*⁶⁶³ that

[a] trial judge may order restitution as part of a “program of treatment or therapy” designed to aid in the rehabilitation of the child in a juvenile case when probation is granted under *W.Va. Code*, 49-5-13 [1978]. Such order, however, must be reasonable in its terms and within the child’s ability to perform.⁶⁶⁴

B. *Substance Abuse*

Justice McHugh held in *State ex rel. M.K. v. Black*⁶⁶⁵ that “[u]nder the provisions of *W.Va. Code*, 16-1-10(19) [1983], *W.Va. Code*, 27-1A-11 [1983], and *W.Va. Code*, 27-5-9 [1977], the West Virginia Department of Health, through its Director and other personnel, has an affirmative duty to provide a comprehensive program for the care, treatment and rehabilitation of juvenile substance abusers.”⁶⁶⁶

IX. LAWYER DISCIPLINARY LAW

A. *West Virginia Supreme Court of Appeals Authority to Regulate the Practice of Law*

Justice McHugh commented upon the West Virginia Supreme Court of Appeals’ authority to regulate the practice of law in *Committee on Legal Ethics of West Virginia State Bar v. Ikner*.⁶⁶⁷ The court held:

Under the authority of the Supreme Court of Appeal’s inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be

⁶⁶² *Id.* at Syl. Pt. 6.

⁶⁶³ 289 S.E.2d 191 (W. Va. 1982).

⁶⁶⁴ *Id.* at Syl.

⁶⁶⁵ 318 S.E.2d 433 (W. Va. 1984).

⁶⁶⁶ *Id.* at Syl.

⁶⁶⁷ 438 S.E.2d 613 (W. Va. 1993).